

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAR 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Petition of LCI International Telecom Corp.
For Expedited Declaratory Rulings

CC Docket No. 98-5

COMMENTS OF
ICG TELECOM GROUP

Cindy Z. Schonhaut
Executive Vice President of Government
Affairs & External Affairs
ICG Communications, Inc.
161 Inverness Drive
Englewood, CO 80112
(303) 414-5464

Albert H. Kramer
Robert F. Aldrich
Valerie M. Furman
Christopher T. McGowan
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for ICG

March 23, 1998

C-12

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
I. THE IMPLICATIONS FOR FACILITIES-BASED COMPETITION MUST BE ADDRESSED	2
II. DETAILS OF IMPLEMENTATION SHOULD BE ADDRESSED IN A RULEMAKING	7
A. Transfer Of Non-Telecommunications/Operational Assets From NetCo To ServeCo	10
B. Transfer Of Personnel From NetCo To ServeCo	12
C. Scope Of The Prohibition On Sharing Of Assets And Services	14
D. The Permissible Scope Of Institutional Advertising	15
E. Safeguards To Ensure ServeCo's Independence: Outside Ownership and Directors	16
F. Nondiscriminatory Referral Procedures	16
G. Universal Service Funding And Obligations	17
CONCLUSION	18

SUMMARY

ICG commends LCI for its serious efforts to expedite local competition by modifying the Section 271 process. In light of continued RBOC resistance to nondiscriminatory interconnection, the Commission needs to explore new ways of ensuring that the Section 271 "lever" is used as effectively as possible consistent with statutory requirements.

However, the ramifications of LCI's "fast track" plan must be carefully explored. While addressing in part the RBOC's conflict of interest as a monopoly supplier and retail service competitor, LCI's plan may not alleviate, and could even aggravate, the RBOCs' interest in discouraging construction of alternative local facilities. By segregating the interest of ServeCo, the retail service provider from that of "NetCo," the monopoly supplier, and by effectively focusing NetCo solely on its role as a "carrier's carrier," the plan would maintain or even enhance NetCo's interest in resisting any developments that would reduce the size of its "carrier's carrier" market. Thus, the proposal may fail to accelerate development of the facilities-based competition that is the acid test of a viable competitive local service market.

In order to ensure that every opportunity to promote facilities-based competition is pursued, the Commission needs to open a rulemaking on LCI's proposal and fully explore appropriate refinements to increase NetCo's incentives to work with facilities-based competitors or otherwise facilitate the evolution of facilities-based competition.

A rulemaking -- albeit with specific deadlines for completion -- is also needed to fully address the implementation issues associated with LCI's proposal. In light of the

complexity of any structural remedy of this sort, a rulemaking is more appropriate, and may be necessary as a legal matter, in order to anticipate and address specific issues concerning the restructuring process. Among the issues that need to be addressed are (1) the definition of non-telecommunications assets that may be transferred to ServeCo, and the appropriate valuation of such assets; (2) concerns regarding the transfer of personnel to ServeCo, including the potential for disproportionate transfer of more qualified and better trained employees and transfer of employees with competitively sensitive information regarding customers and network information; (3) clarifying the scope of the prohibition on sharing of assets and services; (4) scope of permitted institutional advertising; (5) specific requirements for outside ownership and independent directors of ServeCo; (6) nondiscriminatory referral procedures; and (7) universal service funding and obligations.

Other issues undoubtedly will be raised by the commenting parties. Collectively, these issues are too complex to be resolved via a declaratory ruling. While LCI has done a commendable job of developing a proposed framework, filling in that framework requires a rulemaking.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

Petition of LCI International Telecom Corp.)
for Expedited Declaratory Rulings)

CC Docket No. 98-5

COMMENTS OF ICG TELECOM GROUP

Pursuant to the Commission's Public Notice, DA 98-130, released January 26, 1998, ICG Telecom Group ("ICG"), hereby respectfully submits its comments regarding LCI International Telecom Corp.'s ("LCI") Petition for Expedited Declaratory Rulings ("LCI Petition") regarding a "fast track" plan to expedite residential local competition and Section 271 entry by encouraging Regional Bell Operating Companies ("RBOC") voluntarily to establish separate and independent wholesale and retail service companies. ICG is the third largest "facilities-based" competitive local exchange carrier ("CLEC") that is not affiliated with a major interexchange carrier ("IXC").

ICG commends LCI for its serious efforts to expedite local competition by modifying the Section 271 process. ICG agrees that the Commission needs to take a major step to alter the RBOCs' incentives vis-à-vis allowing competitive interconnection. To date, the Section 271 process has not had the hoped-for effect on the incentive structure of the RBOCs. Instead, the RBOCs have continued what are essentially stonewalling, scorched-earth tactics vis-à-vis would-be local competitors. Meanwhile, the RBOCs

continue to file applications for in-region interLATA authority, and to apply political and public relations pressure in hopes of wearing down the resistance of the Justice Department and the FCC to premature approval of those applications.

While this RBOC behavior is disappointing and disturbing, the Commission should not give up. As ICG has stated previously, the Section 271 "carrot" is one of the few effective levers available for the Commission's use in prying open the local monopoly. It is critical to ensure that that lever be used as effectively as possible consistent with statutory requirements.

Therefore, ICG applauds LCI's creative proposal for the Commission to accelerate local competition, not by slowing down the Section 271 process, but instead by holding out the prospect of speeding up the Section 271 process. LCI's proposal deserves serious consideration. However, the ramifications of LCI's fast-track plan must be carefully explored. The implementation of a truly separate subsidiary offers a variety of potential benefits for the promotion of local service competition, but also raises difficult issues and significant dangers.

A key concern is whether LCI's proposal will tend to promote facilities-based local service competition or whether it will only promote a form of resale-based "retail" competition, while allowing facilities-based competition to languish or even be frustrated. See Section I below. A second issue concerns implementation. Although LCI's proposal is commendably thorough in addressing the details of the separate subsidiary concept, it still leaves numerous questions unanswered. Of special concern is the initial reorganization

process, i.e., the procedures that will govern the splitting up of a RBOC into “NetCo” and “ServeCo”. Unless the ground rules for this process are clearly established at the outset, there is a risk that the division will turn out differently from the Commission’s expectations, and that the industry will have to live with yet another flawed competitive structure.

Therefore, ICG urges the Commission to begin a rulemaking to flesh out some of the less clear aspects of LCI’s proposal. Everyone recognizes that there are mounting pressures to act quickly to speed up the Section 271 process. However, the stakes are too high for the Commission to rush to embrace a solution before it is fully thought through. In the remainder of its comments, ICG details a number of issues that need to be further explored before LCI’s proposal could be implemented. ICG expects that even more careful consideration must be given to any counter-proposals launched from the other side.

The dangers of inadequate separation rules are already being played out in some areas. As noted by LCI, BellSouth has filed applications in numerous states – and in some cases has been granted authority – to operate a CLEC affiliate in its own territory without any semblance of adequate structural safeguards. LCI Petition at 16, n.20. The Commission will have to address the implications of this activity in any event. However, in considering LCI’s proposal and alternatives, the Commission must guard against the temptation to embrace a scheme of separation that is so flawed that it tends to frustrate the development of competition.

Therefore, ICG urges the Commission promptly to begin a rulemaking to consider LCI’s proposal and any alternatives advanced by the commenting parties. In order to

ensure early completion of the proceeding, the Commission should announce a specific date when it will issue a notice of proposed rulemaking and a deadline for releasing a decision.

**I. THE IMPLICATIONS FOR FACILITIES-BASED COMPETITION
MUST BE ADDRESSED**

LCI has proposed that the Commission offer RBOCs the option of creating a "separate subsidiary" for its retail local services in exchange for some type of "fast track" treatment under Section 271. The type of separate subsidiary structure proposed by LCI commendably goes much further than most separate subsidiary requirements that have been previously applied in various telecommunications contexts.¹ LCI's proposal is intended to ensure, insofar as possible, that NetCo's *incentives* to discriminate against competitors are removed, thereby relieving much of the regulator's burden of removing NetCo's *ability* to discriminate.

LCI's proposal thus appears to offer substantial benefits to competition in the provision of retail local services. In particular, RBOC implementation of the proposal would substantially reduce the conflict of interest that is inherent in the RBOCs' dual roles as (1) controllers of bottleneck facilities on which all local service competitors currently must rely and (2) competitors in the same retail local service markets as its CLEC customers.

¹ On the other hand, LCI's proposal stops considerably short of requiring total independence, *i.e.*, divestiture.

At the same time, however, there is (paradoxically) a risk that LCI's proposal, while alleviating the RBOCs conflict of interest regarding retail service markets, would *not* alleviate – and could even aggravate – the RBOCs' interest in discouraging the construction of alternative local facilities. The keystone of LCI's plan is the creation of independently motivated "NetCo" and "ServeCo" entities within the RBOC. By separating NetCo's interest from ServeCo's, and restricting its sphere of activity to the "carrier's carrier" market, the plan would reduce NetCo's incentive to discriminate against CLECs that resell NetCo's facilities and services. The difficulty is that, to the extent that the plan succeeds in focusing NetCo on the carrier's carrier market, it would also focus NetCo's interest on maintaining the viability of NetCo's own role in that market. As long as NetCo exists as a relatively independent entity, it would be motivated to resist any developments that would be likely to reduce the size of the "carrier's carrier" market. Indeed, NetCo would be motivated to do whatever it could to discourage the entry of facilities-based carriers, in an area where significant entry barriers already exist, and to encourage the use of its own facilities. Therefore, NetCo could be expected to be more responsive and reasonable in its dealings with "resale" customers – carriers that are not facilities-based to any substantial degree – and less responsive and reasonable in its dealings with facilities-based carriers that require interconnection and/or unbundled network elements ("UNEs") to provide end-to-end service. To the extent that such incentives persisted, the Commission would have "successfully" promoted "retail" competition while failing to further the ultimate statutory goal of fostering true facilities-based competition.

In a footnote, LCI recognizes this difficulty, but argues that it will eventually be resolved because it is “inevitable” that ServeCo will construct its own facilities and thereby incent NetCo to offer reasonable terms for interconnection and UNEs. *LCI Petition* at 34, n.41. However, it is not at all obvious why ServeCo would “inevitably” choose to construct facilities. Like other CLECs, ServeCo would experience NetCo as far more cooperative to the extent that it relied solely on NetCo facilities. Moreover, even if NetCo’s resistance to accelerating its own demise “inevitably” proves futile at some point, it is not clear how long that process would take.²

Furthermore, to the extent that, in order to maintain its facilities’ bottleneck, NetCo facilitated and encouraged use of its facilities as a “recombined” retail service, NetCo would undermine its facilities-based rivals. This effect could be exacerbated by discriminatory practices that made it relatively more expensive and/or difficult to recombine only “segments” of an entire service (for example, where, in order to provide service to customer served by an end office in which a CLEC is not collocated, the CLEC seeks an extended unbundled loop that combines the unbundled loop with multiplexing and

² Recognizing the weakness of its proposal on this point, LCI argues that at least its proposal “does nothing to increase this concern.” *Id.* Unfortunately, LCI is not correct. Once an RBOC has been allowed into in-region interLATA service as a result of complying the NetCo/ServeCo structure, the Commission will have lost its leverage to address remaining structural problems. In the current environment, the Commission and the Department of Justice can at least consider these factors in assessing Section 271 applications. None of this is to suggest that these concerns are grounds for rejecting the NetCo/ServeCo structure. What it does suggest is that these are issues that must be further explored in a rulemaking. See also text following this note.

dedicated transport to the CLEC's point of presence or switch), or a limited number of UNEs.³

In short, there is a danger that the implementation of LCI's proposal -- whatever it does to promote retail competition among resellers of NetCo services -- may do little or nothing to accelerate development of the facilities-based competition that is the acid test of a viable competitive local service market. In order to ensure that every opportunity to accelerate facilities-based competition is pursued, the Commission needs to open a rulemaking on LCI's proposal and to fully explore what refinements to the NetCo/ServeCo proposal could appropriately be made to increase the incentives of NetCo to cooperate with facilities-based customers and/or facilitate the evolution of facilities-based competition in the face of a highly motivated monopoly "carrier's carrier."

II. DETAILS OF IMPLEMENTATION SHOULD BE ADDRESSED IN A RULEMAKING

In addition to addressing the fundamental issue discussed above -- how to ensure that a "fast track" plan promotes facilities-based competition -- there are a variety of implementation issues that must be resolved in order to implement a NetCo/ServeCo plan of the sort that LCI has proposed. Some of these issues are discussed further below.

³ Again, LCI recognizes this difficulty in a footnote. LCI Petition at 33, n.40. The best LCI can suggest is that, "this problem will bear watching in the short term." Unfortunately, the problem can persist, and the appropriate time to attempt to address it is before the RBOC are allowed to provide in-region interLATA services.

ICG submits that a rulemaking, rather than a declaratory ruling, is necessary in order to fully and most effectively implement a NetCo/ServeCo type of plan. While ICG acknowledges and shares the desire to simplify regulation of the RBOCs, the Commission should not disregard past history. On previous occasions -- e.g., the "Computer I"⁴ and "Computer II"⁵ proceedings -- when a separate subsidiary structure was employed, a variety of implementation issues arose. The Commission found it important to work these issues out as much as possible before the fact, in order to prevent the separation process itself from bogging down in litigation, and in order to avoid fostering imprudent actions by RBOCs or competitors in reliance on erroneous interpretations of ambiguous rules.

While it may be that many of the complexities of Computer II implementation can be avoided by adopting a more "separate" separate subsidiary structure, such as LCI has proposed, any restructuring and division of assets is inevitably complex. While the AT&T divestiture was not itself a rulemaking, the implementation of that process required numerous "sub-proceedings" before the District Court, and also spawned numerous FCC rulemaking proceedings. It would be short-sighted and even dangerous to gloss over the

⁴ Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities, 28 FCC 2d 267 (1970), aff'd in part sub nom. GTE Service Corp. v. FCC, 474 F.2d 724 (2nd Cir. 1973), decision on remand, 40 FCC 2d 293 (1973).

⁵ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980), recon., 84 FCC 2d 50 (1980), further recon., 88 FCC 2d 512 (1981), aff'd sub nom. CCIA v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

complexities involved.⁶ Furthermore, a rulemaking would be likely to yield new ideas for constructive improvements in the proposed NetCo/ServeCo scheme.

As a legal matter, whatever the Commission's authority under the Act to implement the type of scheme proposed, ICG questions whether such a scheme can or should be implemented via a declaratory ruling. Given the complexity of the issues raised by LCI's petition, any order attempting to resolve them in a declaratory ruling may be legally infirm. Before adopting standards that would represent an entirely new method of evaluating Section 271 applications, the Commission should follow rulemaking procedures.⁷ The purpose of a declaratory ruling is to "terminate a controversy or remove uncertainty" by clarifying policies, not to adopt new policies. 47 C.F.R. § 1.2; Viacom International v. FCC, 672 F.2d 1034 (2d Cir. 1982). For example, the Commission may not use a declaratory ruling to adopt a new standard that is not a possible interpretation of its existing rules. For this purpose, a formal rulemaking is required. Competition in the Interstate Interexchange Marketplace Petitions for Modification of the Fresh Look Policy, 8 FCC Rcd 5046 (1993). And even where the agency has authority to proceed by either rulemaking or adjudication (the latter of which includes a declaratory ruling (see Chisholm v. FCC, 538 F.2d 349, n.30 (D.C. Cir. 1975))), the Supreme Court has warned that there could be instances where reliance on adjudicative processes rather than rulemaking would

⁶ In Computer II, even after the rulemaking was completed, implementation plans had to be submitted and approved before the RBOCs went ahead with implementation.

⁷ At a minimum, the Commission should adopt a notice of inquiry, leading to a statement of policy.

amount to an abuse of discretion. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974). In the final analysis, LCI's suggested 'fast track' plan is a complex proposal establishing entirely new standards for reviewing Section 271 proposals. A declaratory ruling proceeding is not the appropriate forum for the Commission to develop the requisite record for ruling on such a proposal.

The remainder of ICG's comments explores specific ambiguities that the Commission needs to resolve in a rulemaking.

A. Transfer Of Non-Telecommunications/Operational Assets From NetCo To ServeCo

In its petition, LCI states that "NetCo shall retain all facilities, systems, information, licenses, other intellectual property rights and other assets used in connection with, or relating to, the provision of interconnection, network elements, and exchange, exchange access, and intraLATA toll telecommunications services," and that "none of these assets and capabilities will be transferred upon restructure to ServeCo."⁸ The enumeration of these interconnection- and service-related assets that *may not* be transferred implies that there are other assets – such as buildings, vehicles and general-purposes office equipment and computer systems – that *may* be transferred from NetCo to ServeCo. If such non-

⁸ LCI Petition at 18. This also raises the issue of whether telecommunications assets may be licensed or sold to other CLECs, even though they may not be transferred to ServeCo. ICG believes that other CLECs should be allowed to purchase assets from NetCo. However, the RBOCs may argue that if telecom assets are transferable to other carriers they should also be transferable to ServeCo.

telecommunications/operational assets are allowed to be transferred, then a number of questions arise that require full exploration.

First, a clear line must be drawn to distinguish the non-telecommunications/operational assets that may and may not be transferred from NetCo to ServeCo. For example, is a specialized vehicle such as a “cherry picker” truck “related to the provision of . . . exchange . . . service?” What about computer terminals and software used to answer calls from subscribers? In order to be fair to all parties – including RBOCs – and avoid entering a regulatory morass, the Commission should define at the outset, as clearly and specifically as possible, which asset transfers are or are not allowed.

Second, the Commission must address the valuation associated with any non-telecommunications/operational assets that are transferred. LCI seems to assume these asset transfers will be governed by the Commission’s affiliate transaction rules. Under Section 32.27(c), such asset transfers are to be priced “at the higher of cost less all applicable valuation reserves [*i.e.*, net book value] or estimated fair market value of the asset.” 47 CFR § 32.27(c). However, as a result of Illinois Public Telecommunications Association v. FCC, 117 F.3d 555, 568-70 (D.C. Cir. 1997) (“IPTA”), there is some question about the appropriate standard that applies. In that recent decision, the court of appeals ruled that asset transfers in the context of payphone deregulation are governed by a different standard. According to the court of appeals, the applicable standard is that of Democratic Central Committee of the District of Columbia v. Washington Metro. Area Transit Comm’n, 485 F.2d 786 (D.C. Cir. 1973), which states that the party who bore the

risk of loss should receive the benefit of any gain or excess in value of an asset over net book cost. In the case of price-cap regulated carriers, the court ruled that the parties who should receive such a benefit in the context of payphone deregulation were the RBOC shareholders.

The Commission needs to fully explore this conflict between its affiliate transaction rules and IPTA. It may be that different principles apply when deregulation of certain assets is mandated by law, as it was in the context of IPTA, than when a company voluntarily removes assets from regulation and transfers them to a separate subsidiary as part of a plan to gain "fast track" status. It may also be that the Commission can require compliance with the affiliate transaction rule as a condition of obtaining the rebuttable presumption that LCI proposes. But the issue of asset valuation requires further exploration.

B. Transfer Of Personnel From NetCo To ServeCo

In its petition, LCI states that ServeCo "would not share any officers, directors, personnel, equipment, buildings, services, or other resources with either HoldCo or NetCo, or with any affiliate of those entities. LCI Petition at 17. However, LCI's proposal does not specifically address whether any NetCo personnel will or may be transferred to ServeCo, either at the time of separation or at some subsequent time.

Allowing the transfer of personnel raises a number of significant concerns. First, there is a danger that an RBOC could indirectly subsidize ServeCo, at the expense of NetCo's ratepayers and CLEC customers, either at the time of separation or thereafter, by

deliberately transferring to ServeCo the most highly skilled employees – including employees in whom NetCo has invested substantial training – while leaving NetCo with a disproportionate number of employees who are less talented, less trained and/or relatively overpaid.

Second, there is the potential for NetCo to transfer to ServeCo employees that have competitively sensitive information. For example, the transfer of marketing personnel who have special knowledge of NetCo's larger customers would enable ServeCo to gain a major competitive advantage over other CLECs in marketing to NetCo customers. Similarly, the transfer of NetCo engineers with special technical knowledge of the operation of NetCo's network would provide ServeCo with a major competitive advantage in designing network facilities, equipment and software that interconnects and interoperates efficiently with NetCo's facilities, equipment and software.

The LCI proposal attempts to address these issues generally by prohibiting transfers of "customer proprietary network information" ("CPNI") to ServeCo except pursuant to the FCC's CPNI rules, and by prohibiting ServeCo from "taking [CPNI] with it" on separation. *Id.* at 21. Further, no "information, licenses, [or] other intellectual property rights" could be transferred to ServeCo except on the same terms and conditions in which they are made available to any other carrier. *Id.* at 18, n.25. However, it is not clear whether these prohibitions would apply, or how they could be enforced, regarding the transfer of personnel that have such information "in their heads."

Of course, there are limits to how far the Commission can directly or reasonably regulate such employee transfers without running afoul of other legal constraints. However, the Commission needs to fully explore any legitimate ways to address the possibility that an RBOC could give ServeCo an unwarranted subsidy or competitive advantage by transferring to ServeCo a preponderance of employees with special skills or competitively sensitive information.

C. Scope Of The Prohibition On Sharing Of Assets And Services

In its Petition, LCI proposes that ServeCo be prohibited from “shar[ing] officers, directors, personnel, equipment, buildings, services, or other resources with HoldCo or NetCo. *Id.* at 17. The scope of this prohibition is not entirely clear. For example, it is unclear whether HoldCo or NetCo would be allowed to “share” an office building with ServeCo by leasing space to ServeCo under an arrangement that complies with the Commission’s affiliate transaction rules. *See* 47 CFR § 32.27. If such “transactional” sharing were allowed, the extent of such sharing could become so large that it would be very difficult to effectively ensure compliance with the affiliate transactions rule. The Commission should fully explore whether such “transactional sharing” should be permitted at all, or whether it would “undercut the separation of corporate identities and strategic goals that is the foundation of this plan.” LCI Petition at 29.

In this context, it is important to note that network resources, e.g., exchange services and network elements, may be provided to ServeCo but must be available to any other carrier on the same terms and conditions. If the Commission prohibits “transactional

sharing” of non-telecommunications resources, it must clearly define the boundary between telecommunications and non-telecommunications resources. See Section II.A. On the other hand, if the Commission is inclined to allow “transactional sharing” of non-telecommunications resources, it should consider whether to apply an “available to others on the same terms” requirement, and whether such a requirement would be an effective check on subsidized provision of such functions as the use of RBOC legal services, warehouses, accounting, auditing, personnel recruitment and management, tax insurance and pension services, or other non-telecommunications services and resources.

D. The Permissible Scope Of Institutional Advertising

In its Petition, LCI suggests that NetCo and ServeCo must operate under materially different trade names and service marks. No affiliation between the companies can be reflected in their names or corporate logos. *Id.* at 21. This requirement needs some clarification – for example, as it impacts institutional advertising. It could be inferred from the absolute prohibition on sharing of services that no joint advertising would be permitted. However, HoldCo presumably would be allowed to continue “institutional” advertising. For example, corporate sponsorship of events and ads promoting “the HoldCo family of companies,” presumably would be allowed. However, a question is raised whether the entity that does not share the “Bell” name or logo with HoldCo could be specifically mentioned in such institutional advertising, as in “the HoldCo family – including NetCo, ServeCo, MobileCo and NetCo ISP.” Repeated use of the name could

foster the same perception of affiliation that the restriction on name and logo sharing is supposed to prevent. The appropriate forum for addressing these issues is a rulemaking.⁹

E. Safeguards To Ensure ServeCo's Independence: Outside Ownership and Directors

LCI's petition calls for minority public ownership in ServeCo "in the range of 40% or more" to ensure that the new company is substantially independent from HoldCo and NetCo. *Id.* at 17. This ambiguity needs to be resolved. The Commission should carefully consider how much minority ownership is necessary in order to establish ServeCo as a truly separate entity in terms of an independent motivation to grow and prosper without regard to the impact of NetCo's profitability.

Similarly, LCI proposes that ServeCo should have "independent" board members specifically charged with representing the interests of the public shareholders. The Commission should specify the minimum number and percentage of board positions that must be independent.

F. Nondiscriminatory Referral Procedures

Another important issue that should be fleshed out in a rulemaking concerns nondiscriminatory "referrals" and related procedures. LCI's petition attempts to address

⁹ Clearly, it is not sufficient to say that these questions can be addressed after the RBOC achieves in-region interLATA entry. Any *ex post facto* attempt to interpret the declaratory ruling to impose such restraints is sure to be met by legal challenges, particularly in speech areas. On the other hand, imposing these conditions *ex ante* as a voluntary condition of choosing the NetCo/ServeCo structure creates fewer legal uncertainties for all and allows the RBOCs as well as competitors to know the conditions that will apply.

this issue with the general statements such as that “NetCo would have to follow nondiscriminatory procedures” *Id.* at 21. In the Computer II separate subsidiary environment, however, referral by local exchange carriers of new local service customers to a source of CPE proved to be a sensitive issue that required substantial exploration of appropriate referral “scripts.” American Information Technologies, et al., 102 FCC 2d 1089, 1107-10 (1985). The Commission should develop a specific rule on what kinds of practices are and are not permissible, the procedures and/or criteria for ensuring nondiscriminatory referrals, etc.

G. Universal Service Funding And Obligations


LCI's Petition sets forth general principles to govern the universal service funding and obligations of NetCo and ServeCo, respectively. However, in this sensitive area it is important to fully explore the details of exactly how the new structure would affect the universal service rights and obligations of all LECs.

CONCLUSION

There are other issues that will undoubtedly be raised by commenting parties. Collectively, these issues are far too complex to be resolved via a declaratory ruling. While LCI has done a commendable job of developing the framework for a proposal, frameworks are not appropriately or legally implemented through a declaratory ruling. The Commission should institute a rulemaking.

Respectfully submitted,

Cindy Z. Schonhaut
Executive Vice President of Government
Affairs and External Affairs
ICG Communications, Inc.
161 Inverness Drive
Englewood, CO 80112


Albert H. Kramer
Robert F. Aldrich
Valerie M. Furman
Christopher T. McGowan
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202) 828-2226

Attorneys for ICG

Dated: March 23, 1998

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 1998, a copy of the foregoing Comments of the ICG was sent by first class United States mail to the following:

Anne K. Bingaman
Douglas W. Kinkoph
LCI INTERNATIONAL TELECOM CORP.
8180 Greensboro Drive
suite 800
McLean, Virginia 22102

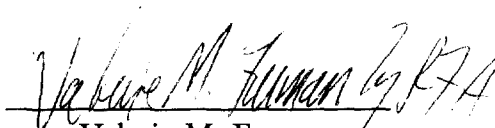
Rocky N. Unruh
MORGENSTEIN & JUBELIRER
One Market
Spear Street Tower, 32nd Floor
San Francisco, CA 94105

Janice M. Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 544
Washington, DC 20554

Peter A. Rohrbach
Linda L. Oliver
HOGAN & HARTSON L.L.P.
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Eugene D. Cohen
326 West Granada Road
Phoenix, AZ 85003

ITS
1231 20th Street, NW
Washington, DC 20037


Valerie M. Furman